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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, RACHEL MEEROPOL,	Case No. 06-cv-313
Plaintiffs,	Judge Gerard E. Lynch
v.	Magistrate Judge Kevin N. Fox
GEORGE W. BUSH, President of the United States; NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, LTG Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Michael V. Hayden, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JOHN D. NEGROPONTE, Director of National Intelligence,	
Defendants.	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' *MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT*

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INTRODUCTION

This case maintains that the President violated a criminal statute, the separation of powers, and the First and Fourth Amendments when he ordered the National Security Agency (NSA) to conduct warrantless wiretapping of American citizens' phone calls and email communications with persons outside the United States. Having bypassed Congress and secretly authorized this warrantless wiretapping program in defiance of a statutory prohibition, Defendants now invoke the "state secrets" privilege and argue that the program's very secrecy immunizes it from any judicial review. On this view, the President has unilateral power both to violate the law, and then to block any judicial oversight of his actions simply by asserting that his violation of law was a secret.

Defendants' motion seeks dismissal on two grounds: (1) that Plaintiffs lack standing to sue; and (2) that the invocation of the "state secrets" privilege demands dismissal of all of Plaintiffs' claims. Neither argument withstands scrutiny. Plaintiffs have standing to sue because they have suffered and are suffering concrete objective injuries to their ability to pursue their legal representation of clients and to exercise their First Amendment rights. Their pro bono representation requires confidential communications with persons outside the United States—including clients, potential clients, witnesses, and others—who fall squarely within the category of persons identified by Defendants as the targets of the NSA spying program.

As to the "state secrets" privilege, Plaintiffs maintain that the judicial branch has a solemn responsibility in our tripartite system of government to check executive overreaching, and that in this case the Court can do so without the need to delve into any further facts about the NSA Program. Because the government has admitted the existence of the Program and all of the facts required to decide its legality, "the very subject matter" of the case is not a state secret.

Further, no additional facts are necessary or relevant to Plaintiffs' claims or any valid defense. Plaintiffs' challenge raises purely legal questions perfectly susceptible of judicial resolution without delving into further, potentially privileged, facts.

Moreover, even if the Court determined that more facts were necessary, dismissal would be premature. If it believes more facts are necessary, the Court should first require Defendants to disclose all non-privileged information, and only then assess the effect, if any, of the state secrets privilege. To dismiss this case outright, as Defendants suggest, without first assessing whether it can be litigated on nonprivileged facts would be to render "checks and balances" wholly subservient to executive whim.

I. PLAINTIFFS HAVE STANDING TO SUE

Plaintiffs have standing to sue because they regularly engage in precisely the type of communications that the government has admitted are targeted by the NSA Program—international communications with persons suspected of being associated with Al Qaeda, affiliated organizations, or terrorism generally. The risk that Plaintiffs' communications are being subjected to warrantless monitoring has caused direct injury to their ability to fulfill their professional responsibilities as attorneys and to the exercise of their First Amendment rights. They cannot assure their clients, witnesses, or others with whom they need to communicate that their conversations are confidential, and as such they are forced to forego some communications altogether and to pursue more costly and less efficient means for others. In addition, persons with whom they seek to communicate have been deterred from speaking to Plaintiffs as a result of the knowledge that their communications may be monitored. The resulting injuries to Plaintiffs' professional work as public interest attorneys, which is protected by the First Amendment, are more than sufficient to provide standing to sue.

In order to establish standing, Plaintiffs must demonstrate that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (internal quotation omitted). Plaintiffs must also demonstrate that the injury-in-fact they have suffered or are at risk of suffering is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Relying principally on *Laird v. Tatum*, 408 U.S. 1 (1972), Defendants dismiss Plaintiffs' injuries as mere "subjective chill," and insist that such injuries are never sufficient to establish standing to sue. On Defendants' theory, if the government announced tomorrow that it had authorized warrantless wiretapping of all conversations of criminal defendants in "serious felony cases," but declined to identify the particular defendants it was monitoring, neither criminal defense lawyers nor a public defender's office would have standing to challenge the program. This would be an extraordinary extension of *Laird*, which simply held that the fear that the government might misuse information obtained in a lawful surveillance program was insufficient to create a case or controversy.

In fact, it is well established that government action that has a deterrent or "chilling" effect on the free exercise of First Amendment rights can create a constitutional violation and give rise to injury in fact even where the action falls short of a direct prohibition against the exercise of such rights.[1] Where plaintiffs "demonstrate 'a claim of specific present objective harm or a threat of specific future harm'" as a result of government action that chills First Amendment freedoms, they have shown sufficient injury to establish standing. *Meese v. Keene*,

[1] *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 757 (1988); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *Sec'y of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 956-57 (1984); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (citing cases).

481 U.S. 465, 472 (1987) (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972)). Plaintiffs have done so here.

A. Plaintiffs have suffered injury-in-fact to a legally protected, concrete interest

The NSA Program has invaded two interests protected by the First Amendment. Plaintiffs[2] have a First Amendment interest in communicating with their clients, witnesses, fellow counsel and other persons. In addition, "the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *NAACP v. Button*, 371 U.S. 415, 429 (1963). *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) ("We long have recognized the important political and expressive nature of litigation.").

Plaintiffs have already suffered injuries to these dual First Amendment interests, and are at risk of suffering additional injury if the challenged practices continue. First, the fact that Plaintiffs' overseas contacts are within the group targeted by the NSA Program means that Plaintiffs cannot engage in confidential communications with their overseas clients and other persons by the most efficient, inexpensive, and convenient means—telephone and email. Instead, they must forego some communications altogether, and reserve others for in-person visits or other secure means of communication. The need to communicate by these less-efficient means often means that communications have to be delayed, and these delays in turn add to delays in securing relief for clients. *See* Goodman Aff. ¶ 15; Supp. Goodman Aff. ¶¶ 5-9; LaHood Aff. ¶¶ 5-7; Meeropol Aff. ¶¶ 5, 6, 8-11, 16, 18. The added expense and effort of making personal

[2] Plaintiff CCR has organizational standing to pursue the interests of its other unnamed employees in a representative capacity because its other staff have standing, the interest this suit seeks to vindicate are "germane to the organization's purpose," and nothing about the claims requires the participation of the individuals so represented. *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs., Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). CCR also has organizational standing based on the injury to itself as an organization. *Cf. Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521-22 (9th Cir. 1989) ("When congregants are chilled from participating in worship activities, ... we think a church suffers organizational injury because its ability to carry out its ministries has been impaired.").

visits to persons located overseas and taking other such precautions is an injury objectively caused by the Program and redressable by the relief requested.

The revelation of the Program and its targeting at their overseas contacts has also forced Plaintiffs to undertake to review and analyze all past international communications (back through late 2001 when the Program began) that may have involved sensitive matters in order to evaluate whether confidences may have been breached by Defendants' illegal surveillance and whether measures ought to be taken in response. *See* Goodman Aff. ¶ 16; LaHood Aff. ¶ 9; Meeropol Aff. ¶ 13.

Plaintiffs have also been compelled by their professional responsibilities to move for disclosure of whether privileged communications were and are subject to surveillance under the Program. Plaintiffs have already done so in one case involving persons the government has at some point characterized as fitting the Program's announced target group. *See Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 40675 (E.D.N.Y. May 30, 2006). After months of negotiations, briefing, and argument, the magistrate in that case compelled the government to reveal whether members of its trial team or likely witnesses are "aware of any monitoring or surveillance of communications between any of the plaintiffs and their attorneys." *Id*. at *25. The government has not disclosed the information, and has sought review before the district court, necessitating still further efforts on Plaintiffs' part. Like the other measures described above, this process has been costly to the Plaintiffs involved in terms of diversion of time and effort. *See* Meeropol Aff. ¶ 15; *cf*. Supp. Goodman Aff. ¶ 10. Defendants, by operating this system of unlawful surveillance, have not only imposed a barrier to, but placed a tax on, Plaintiffs' exercise of their First Amendment rights.[3]

[3] There is no doubt that the imposition of financial burdens on protected speech may constitute a First Amendment violation. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S.

Federal courts have consistently recognized injuries of this sort as a sufficient basis for standing. In *Meese v. Keene*, 481 U.S. 465 (1987), for example, the Court granted standing to Barry Keene, a California State Senator who was deterred from showing foreign films by Foreign Agents Registration Act provision that required the films to be labeled as "political propaganda." The Court held that Keene had standing because he had demonstrated not only a "subjective chill," but also had presented evidence of "specific present objective harm or a threat of specific future harm" by showing that the government's actions "caused or ... threate[ned] to cause a direct injury" that was "distinct and palpable," *id*. at 472:

> We find … that appellee has alleged and demonstrated more than a "subjective chill"; he establishes that the term "political propaganda" threatens to cause him cognizable injury. He stated that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." 569 F.Supp., at 1515.

481 U.S. at 473. The Court found that Keene had shown that he "could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career." *Id*. at 475. While Keene could have minimized the damage to his reputation with appropriate disclaimers, "the need to take such affirmative steps to avoid the risk of harm" was itself cognizable injury. *Id*. at 475. Similarly, Plaintiffs here have already taken affirmative steps, and will have to continue to do so in the future, to counteract and minimize the damage the Program does to their First Amendment interests.

Keene thus stands in contrast to *Laird v. Tatum*, 408 U.S. 1 (1972), upon which Defendants principally rely. In *Laird*, army intelligence agents infiltrated public political meetings and protests involving the plaintiffs, and kept data on what they observed. The case was dismissed on standing grounds. The *Laird* plaintiffs failed to show that "any cognizable

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105 (1991); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints).

interest" of theirs was harmed because they claimed only that "defendants might, in the future, make unlawful use of the data gathered." *Keene*, 481 U.S. at 472. (The method of surveillance used—infiltration of public gatherings—was not itself illegal.) *Laird* stands for nothing more than the point that "allegations of a subjective chill"[4] do not by themselves suffice to convey standing if they are based on only the idea that the government "might in the future" make unlawful use of the information being lawfully gathered. *Laird,* 408 U.S. at 13-14; *id.* at 11. Because the *Laird* plaintiffs claimed that the "exercise of [their] First Amendment rights is being chilled by the mere existence, without more, of a governmental investigation and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose," *id.* at 10 (emphasis added), they failed to meet this test. Plaintiffs here, by contrast, do not complain merely of some potential future misuse of surveillance information, but assert that they are currently suffering from ongoing injuries to their exercise of protected First Amendment rights.

Lower courts have consistently found standing to exist where plaintiffs can show that a subjective chill caused by surveillance is accompanied by economic and professional harm, including the diversion of time and effort to institute countermeasures such as those Plaintiffs have taken here. In *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), the INS had, without probable cause, sent agents wearing bugs to infiltrate churches associated with the Sanctuary movement. The existence of the surveillance program was revealed to the public by subsequent criminal trials. The court held that

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4 The *Laird* plaintiffs came close to conceding that they were not themselves chilled. 408 U.S. at 14 n.7 (plaintiffs "cast considerable doubt" on whether they were in fact chilled); *see also Laird*, 444 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J., concurring in part). Although *Laird* is popularly associated with the idea that "allegations of a subjective chill are not an adequate" injury to convey standing without more, "this language may plausibly be regarded as dictum" given that there may not have been a chill of any sort—objective or subjective—in that case. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 413 (3d Ed. 1999).

> the churches have alleged actual injuries as the result of the INS' conduct. For example, they allege that as a result of the surveillance of worship services, members have withdrawn from active participation in the churches, a bible study group has been canceled for lack of participation, clergy time has been diverted from regular pastoral duties, support for the churches has declined, and congregants have become reluctant to seek pastoral counseling and are less open in prayers and confessions.
>
> ... In our view, the churches have suffered harm analogous to the "reputational" or "professional" harm that was present in [*Meese v.*] *Keene*. ... Clearly, this [type of] injury to the churches can "fairly be traced" to the INS' conduct.

Presbyterian Church, 870 F.2d at 521-23. Plaintiffs here have suffered similarly objective harms. Plaintiffs have demonstrated that the measures they must take to ensure confidentiality in communications are costly, both in terms of actual additional expense and loss of efficiency in communication. *See* Goodman Aff. ¶ 15. Like the clergy members in *Presbyterian Church*, Plaintiffs have shown that the illegal surveillance program has forced them to divert time from other duties to implement communications safeguards and review past communications for possible breaches of confidentiality. *See id*. Far from a mere "subjective chill," these measures are obligatory as a matter of professional legal ethics. *See* Affirmation of Stephen Gillers ¶ 9 ("The decision [to avoid using electronic means of communications for client secrets or confidences] is not discretionary. It is obligatory."). This "'professional' harm" is sufficient to support standing. *Presbyterian Church*, 870 F.2d at 522; *see also Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990) ("the effect of [the surveillance here] goes beyond subjective fear to include injury to [plaintiffs'] personal, political, and professional reputations.").[5]

[5] Courts have consistently held that a burden on plaintiffs professional activities constitutes sufficient injury to sustain standing. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 194 (1976); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976); *Clark v. Library of Cong*., 750 F.2d 89, 93 (D.C. Cir. 1984) (worker had standing to sue his government employer for triggering an FBI investigation into the worker's political associations where the investigation had cost him employment opportunities); *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975) (high school student had standing to seek expungement of an FBI file linking her with "subversive material" because of the mere potential that the file would harm the plaintiff's future educational and employment opportunities); *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) (attorney had standing to sue to enjoin unlawful FBI and NSA surveillance

The Court of Appeals for the Second Circuit has similarly held that claims alleging "chilling effect" are cognizable if accompanied by concrete evidence of an actual or threatened injury. *See, e.g.*, *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999) (evidence that officers turned down speaking requests because of challenged police guidelines is sufficient to substantiate claim that guidelines chilled speech).[6]

Courts have also regularly distinguished *Laird* on the ground that it challenged the use of information obtained through concededly lawful surveillance. It is one thing to claim that one is chilled by the speculative possibility that the government might misuse information lawfully obtained; it is another matter entirely to claim that one is deterred by being targeted for unlawful surveillance. *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 147, 150-51 (D.D.C. 1976) ("while collection and retention of information, if collected in a legal manner, cannot be challenged, ... illegal electronic surveillance ... [is] subject to challenge as beyond "legitimate surveillance activities"; "numerous acts of warrantless electronic surveillance" held justiciable) (emphasis added); *see also Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) ("allegations of a system of independently unlawful intrusions into his life as the result of his lawfully held and lawfully expressed political views" establishes injury, causation and standing), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Riggs*, 916 F.2d at 586 ("defendants continue to conduct illegal surveillance of plaintiffs' activities.");

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because the investigation had deterred others from associating with him and caused "injury to his reputation and legal business."), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982).

6 *See also Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992) (university's implicit threat of future discipline sufficient to create a judicially cognizable chill on professor's speech); *Nitke v. Ashcroft*, 253 F. Supp. 2d 587, 598 (S.D.N.Y. 2003) (Organization alleged a justiciable chill based on statement that they avoided posting arguably erotic fiction or images after passage of an obscenity law); *Mazza v. Hendrick Hudson Cent. Sch. Dist.,* 942 F. Supp. 187, 192-93 (S.D.N.Y. 1996) (allegations that plaintiffs refrained from engaging in many activities, including organizing and speaking out at public meetings, and other public action support claim of actual chill); *Mason v. Ward*, No. 88 CIV. 4704, 1991 U.S. Dist. LEXIS 9965, *17-*18 (S.D.N.Y. July 20, 1991) ("Plaintiffs' affidavits allege that defendants' system of surveillance damaged plaintiffs' reputations and caused them to lose business").

Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335, 1338 (3d Cir. 1975) (supplying surveillance information to non-governmental actors was not a legitimate governmental function and thus challengeable notwithstanding *Laird*).

Finally, Plaintiffs need not demonstrate that their communications have *in fact* been overheard in order to establish standing to sue. It is enough to show that the government's actions have created a credible threat that their communications will be overheard. (*See also* Part III.A.1, *infra*.)

B. Plaintiffs' Injuries Are Caused by the NSA Program and Redressable by the Requested Injunction

The government describes Plaintiffs' injuries as "subjective," *see, e.g.*, Defendants' Memorandum in Support of Motion to Dismiss, Dkt. 32 (hereinafter "MTD"), at 19, a characterization presumably meant to suggest that their injuries are self-inflicted and lack a causal relationship to the NSA Program. However, some of Plaintiffs' injuries have nothing to do with their own conduct. One of the foreseeable professional injuries to Plaintiffs is that other individuals—potential clients and professional contacts vital to their work—will no longer be willing to provide Plaintiffs with the information they need to engage in civil and human rights advocacy because of fear of the NSA Program. *See, e.g.*, Meeropol Aff. ¶ 17. Plaintiffs have not unilaterally chosen to cut off communications on account of their own concerns; rather, at times it is the people they speak with that have (quite reasonably) chosen to stop communicating with Plaintiffs.

Defendants maintain that even if Plaintiffs have suffered injury in fact, that injury is not fairly traceable to the NSA Program, nor redressable by the relief requested, because Plaintiffs' communications "could be subject to surveillance by other means or entities," including by warrants issued under Title III or FISA. MTD at 23.[7] In fact, the risk posed to attorneys by unchecked and unsupervised warrantless monitoring is vastly more grave than the risk posed by judicially regulated monitoring.

The Program introduces a degree of risk to Plaintiffs' privileged communications that is different both in degree and in kind from the risk presented under the former regime. Before the advent of Defendants' warrantless wiretapping program, attorneys and legal staffers at the Center faced a much lower risk of interception because all interceptions were subject to judicial oversight. This requirement minimized both unjustified targeting of innocent people and the frequency of surveillance. In addition, under the former regime attorneys could trust (and assure their clients) that their privileged communications would remain confidential because any information intercepted under the standard lawful procedures was subject to "minimization procedures required" to protect privileged information. *See* 50 U.S.C. § 1806(a) (stating that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); *id.* § 1801(h) (defining required "minimization" procedures); 18 U.S.C. § 2518(5) (equivalent for Title III).[8]

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7 Defendants' reliance on *CFTC v. Weintraub*, 471 U.S. 343 (1985), is misplaced. The Court in *Weintraub* noted that there was a very weak causal relationship between the challenged practice (giving right to exercise attorney-client privilege to corporate bankruptcy trustee) and the alleged injury (chill on attorney-client relations with corporate management), because it was based on an unsupported, speculative claim that a bankruptcy trustee might waive the privilege more freely than ordinary management would. *See* 471 U.S. at 357 ("the chilling effect is no greater here than in the case of a solvent corporation").

8 Such statutory minimization provisions institute the constitutional particularity requirement for wiretapping warrants. *See United States v. Daly,* 535 F.2d 434, 440 (8th Cir. 1976) (Title III minimization provision "was passed by Congress in order to comply with the constitutional mandate … that wiretapping must be conducted with particularity."); *see also United States v. Scott*, 436 U.S. 128, 135-39 (1978) (conflating Fourth Amendment and statutory standards for minimization). Courts in this circuit have interpreted minimization requirements to include a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g.*, *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where officers instructed not to monitor, record or spot-check privileged conversations, and where "none of the approximately 50 privileged conversations were either monitored, recorded or spot-checked"); *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973) (minimization met where "monitoring agents were specifically instructed not to intercept privileged conversations" and "no serious argument is made here that privileged calls were intercepted"), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. DePalma*, 461 F. Supp. 800, 818-19 (S.D.N.Y. 1978) (procedures in place to minimize

The minimization and judicial oversight requirements mandated where the government seeks to carry out wiretapping under FISA and Title III are mutually reinforcing and serve to protect the confidentiality of privileged communications. *See United States v. Bynum*, 360 F. Supp. 400, 410 (S.D.N.Y. 1973) (judicial review of ongoing surveillance is a "vital aspect of the minimization requirement—perhaps the most vital"), *vacated on other grounds*, 417 U.S. 903 (1973); *see also United States v. Angiuolo*, 847 F.2d 956, 979 (1st Cir. 1988) ("[s]uch [ongoing] judicial oversight ... is recognized as an ongoing check upon the reasonableness of the agents' conduct"); *United States v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975); Ellen S. Pogdor & John Wesley Hall, *Government Surveillance of Attorney Client Communications: Invoked in the Name of Fighting Terrorism,* 17 Geo. J. Legal Ethics 145, 151 (2003) ("Title III monitoring…has constant judicial oversight and the order must take care to protect the privileged nature of the communications."). Both features are absent from the warrantless surveillance carried out under the NSA Program. Indeed, the administration has admitted that, "[a]lthough the program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception." Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006) at 15, ¶45, *available at* http://judiciary.house.gov/media/pdfs/responses032406.pdf.

The fact that an injunction cannot guarantee Plaintiffs that their communications will be free from any risk of surveillance does not negate the fact that such an injunction would provide substantial relief. As the Supreme Court has explained, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456

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interception of privileged calls, including daily review of surveillance logs by supervisory agents and review once every five days by judges).

U.S. 228, 243 n.15 (1982) (emphasis in original); *see also Keene*, 481 U.S. at 476 (finding standing where requested injunction "would at least partially redress" plaintiff's injury).

II. THE STATE SECRETS PRIVILEGE CANNOT IMMUNIZE THE EXECUTIVE LAWLESSNESS AT ISSUE HERE

Defendants' second basis for dismissal is that this case cannot be litigated without resort to information that is privileged as a "state secret." Defendants maintain that the very subject matter of the lawsuit is a secret, and that therefore no judicial review of its legality is permissible, even on the basis of facts that have already been publicly disclosed. In addition, Defendants argue that resolution of the legal issues in the case will require the disclosure of further facts about the program, and that all of those facts are privileged as state secrets.

As Plaintiffs will show, the subject matter of this lawsuit is public knowledge, and was made a matter of public knowledge in significant respect by Defendants' own disclosures. Adjudicating purely legal issues based on the facts already disclosed by Defendants is plainly permissible. And the facts already disclosed are fully sufficient to adjudicate the discrete legal challenges that Plaintiffs have advanced—that the Program violates FISA and 18 U.S.C. § 2511(2)(f), that the Program violates the separation of powers, and that the Program violates Plaintiffs' First and Fourth Amendment rights.

This case presents serious claims that the President secretly ordered that criminal conduct be undertaken in his name. To allow his lawyers to bar any inquiry into the legality of his actions by claiming that the alleged lawless action is itself a secret would be to undermine not only our constitutional system of checks and balances, but the rule of law itself.

A. The Government's View of the State Secrets Privilege Would Preclude Judicial Review and Immunize Executive Action.

The government's broad view of the state secrets doctrine, if accepted, would literally immunize executive action from judicial scrutiny. Under the government's theory, the Executive could escape accountability for any illegal action by taking refuge in the state secrets doctrine. That view, like the government's view on the merits that it can ignore laws expressly passed by Congress to limit the President's authority, is unsupported by the Constitution or case law. The executive branch cannot disable, by unilateral fiat, the power of Article III courts to be the ultimate arbiters of the law and the Constitution. *Cf. Marbury v. Madison*, 15 U.S. (1 Cranch) 137, 177 (1803) ("it is emphatically the province and duty of the judicial department to say what the law is."); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."). The Supreme Court has stated that "[w]hen the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997); *see also Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," not matters for unilateral Executive decision). To allow the Executive to have the first and final say on the extent of its own power flies in the face of the most basic separation of powers principles. *Clinton*, 520 U.S. at 699 ("The Framers 'built into the tripartite Federal Government…a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (stating that the framers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.").

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court rejected claims of unilateral executive power, even with respect to holding enemy combatants in wartime, and declared that whatever power the Constitution envisions for the Executive in wartime, it surely "envisions a role for all three branches when individual liberties are at stake." *Id*. at 536. To allow the state secrets doctrine to bar purely legal claims regarding the alleged authority of the President to violate the law would constitute a total abdication of the responsibilities of the judiciary.

Courts are plainly competent to review cases implicating even the most sensitive national security issues, and have done so routinely. In the past five years, in cases related to the same "war on terror" that the government invokes to preclude judicial review here, courts have decided whether the President can detain enemy combatants captured on the battlefield in Afghanistan and whether those captured are entitled to due process, *Hamdi*, 542 U.S. 507 (2004); whether individuals detained at Guantanamo Bay can challenge their detention, *Rasul v. Bush*, 542 U.S. 466 (2004); and whether these detainees may be subjected to trials not conforming to rules set by Congress, *Hamdan v. Rumsfeld*, 2006 WL 1764763 (June 29, 2006). In the past, courts have determined whether the military can try individuals detained inside and outside zones of conflict, during times of hostility and peace;[9] whether the government could prevent newspapers from publishing the Pentagon Papers because it would allegedly harm national

[9] *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (court martial proceedings in Korea); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (commissions in occupied Germany); *Ex parte Quirin*, 317 U.S. 1 (1942) (German saboteurs tried by military commission); *Duncan*, 327 U.S. 304 (military trial of civilians in Hawaii); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (civilian in Indiana tried by military commission).

security;[10] whether the executive branch, in the name of national security, could deny passports to members of the Communist Party;[11] whether U.S. civilians outside of the country could be tried by court-martial;[12] whether the President could seize the steel mills during a labor dispute when he believed steel was needed to fight the Korean War;[13] whether the Executive could continue to detain a loyal Japanese-American citizen under a war- related executive order;[14] whether the President could block southern ports and seize ships bound for Confederate ports during Civil War;[15] and whether the President could authorize the seizure of ships on the high seas in a manner contrary to an act of Congress during a conflict with France.[16] If courts were able to decide these cases, nothing should preclude judicial review in this case.[17]

Courts have a special duty to review executive action that threatens fundamental liberties. As Judge Cardamome recently warned, "[w]hile everyone recognizes national security concerns are implicated when the government investigates terrorism within our Nation's borders, such concerns should be leavened with common sense so as not forever to trump the rights of the citizenry under the Constitution." *Doe v. Gonzales*, 449 F.3d 415, 423 (2d Cir. 2006) (Cardamone, J., concurring) (emphasis omitted). "A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the

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10 *New York Times Co. v. United States*, 403 U.S. 713 (1971).

11 *Kent v. Dulles*, 357 U.S. 116 (1958).

12 *Reid v. Covert*, 354 U.S. 1 (1957).

13 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

14 *Ex parte Endo*, 323 U.S. 283 (1944).

15 *The Prize Cases (The Amy Warwick)*, 67 U.S. 635 (1862).

16 *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

17 Courts also routinely handle classified evidence in criminal cases, *see generally* Classified Information Procedures Act, 18 U.S.C. app. III § 1 *et seq* (hereinafter "CIPA"); *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (reviewing classified materials in detail), decide whether to force disclosure of national security information in FOIA cases, *see, e.g.*, *Halpern v. F.B.I.*, 181 F.3d 279 (2d Cir. 1999) (rejecting government's Exemption 1 claim), and review classification decisions to independently determine whether information is properly classified, *see, e.g.*, *McGehee v.* Casey, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring de novo judicial review of pre-publication classification determinations to ensure that information is properly classified and agency "explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification"); *see also Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (requiring judicial review of pre-publication classification determinations).

independence of the judiciary and open the door to possible abuse." *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986).

Ultimately, only the Court can ensure that plaintiffs are not unnecessarily denied their "constitutional right to have access to the courts to redress violations of [their] constitutional and statutory rights." *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978). Courts have an active and important role to play in evaluating state secrets claims, particularly where dismissal is sought on the basis of the privilege. The Supreme Court has cautioned that judicial control "cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). It is "the courts, and not the executive officer claiming the privilege, who must determine whether the claim is based on valid concerns." *Jabara v. Kelley*, 75 F.R.D. 475, 484 (E.D. Mich. 1977).[18]

B. The State Secrets Privilege Is a Narrowly Construed Evidentiary Privilege, Not an Immunity Doctrine.

The Supreme Court outlined the proper use of the state secrets privilege fifty years ago in *United States v. Reynolds*, 345 U.S. 1 (1953), and has not considered the doctrine in depth since then. In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. *Id*. at 3. The Court first held that the privilege could be invoked only upon "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id*. at 7-8.

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[18] *See also In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role"); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine the instances of its invocation."); *Molerio v. F.B.I.*, 749 F.2d 815, 822 (D.C. Cir. 1984) ("[T]he validity of the government's assertion must be judicially assessed.").

The *Reynolds* Court then upheld the claim of privilege over the accident report, but did not dismiss the suit. Rather, it remanded the case for further proceedings, explaining:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets

Id. at 11. Upon remand, the case continued with limited discovery (depositions of surviving crew members) and eventually settled. *See Herring v. United States*, 2004 U.S. Dist. LEXIS 18545 at *6, *37 (E.D. Pa. 2004).

The privilege is "not to be lightly invoked," nor is it to be "lightly accepted." *Reynolds*, 345 U.S. at 7, 11; *see also Jabara*, 75 F.R.D. at 481. As this Court has cautioned, "the contours of the privilege for state secrets are narrow, and have been so defined in accord with uniquely American concerns for democracy, openness, and separation of powers." *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002); *see also In re United States*, 872 F.2d 472, 478-79 (D.C. Cir. 1989) ("Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise should in every instance be limited to their narrowest purpose.") (internal quotation marks omitted); *Jabara*, 75 F.R.D. at 480 ("claims of executive privilege ... must be narrowly construed"); *Spock*, 464 F. Supp. at 519. Courts have recognized that the privilege is more properly invoked on an item-by-item basis, and not with respect to overbroad categories of information. *See, e.g.*, *In re United States*, 872 F.2d at 478.

In the majority of cases since *Reynolds*, courts have considered the state secrets privilege in response to particular discovery requests, not as the basis for wholesale dismissal of legal claims concerning the facial legality of a government program. Thus, the typical result of the successful invocation of the state secrets privilege is simply to remove the privileged evidence from the case but to permit the case to proceed.[19]

Outright dismissal of a suit on the basis of the privilege, and the resultant "denial of the forum provided under the Constitution for the resolution of disputes ... is a drastic remedy." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985); s*ee also In re United States*, 872 F.2d at 477 ("[d]ismissal of a suit" on state secrets grounds at any point of the litigation "and the consequent denial of a forum without giving the plaintiff her day in court ... is ... draconian"); *Spock*, 464 F. Supp. at 519 ("An aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief.").

Accordingly, courts have refused to dismiss suits prematurely based on the government's unilateral assertion that state secrets are necessary and relevant to adjudicating all of the claims—particularly without first considering all non-privileged evidence. *See, e.g.*, *In re United States*, 872 F. 2d. at 477; *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1364-65 (Fed. Cir. 2001); *Spock*, 464 F. Supp. at 519-20. Similarly, courts have refused to dismiss cases based

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19 Many courts have allowed cases to proceed in some form, and often to a merits resolution, despite the invocation of the privilege. *See, e.g., Reynolds*, 345 U.S. at 11 (remanding for further discovery and normal proceedings); *DTM Research, L.L.C.*, 245 F.3d at 334 (rejecting a "categorical rule mandating dismissal every time the state secrets privilege is validly invoked" in a litigation, and remanding the case for further proceedings after upholding a claim of privilege to quash a subpoena); *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968) (upholding claim of privilege in defamation suit, but remanding for further discovery of non-privileged evidence); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982) (deciding case on merits despite prior successful claim of privilege); *Att'y Gen. v. The Irish People, Inc.*, 684 F.2d 928, 955 (D.C. Cir. 1982) (upholding invocation of the privilege but declining to dismiss the case); *Ellsberg*, 709 F.2d at 66-70 (upholding part of privilege claim but remanding for merits determination); *Monarch Assur. P.L.C. v United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (upholding CIA's privilege claim in contract action involving alleged financing of clandestine CIA activity, but remanding for further discovery because "the court was premature in its resolution of the difficult issue regarding the circumstances under which national security compels a total bar of an otherwise valid suit"); *Jabara*, 75 F.R.D. at 489, 493 (upholding part of privilege claim but going forward with decision on the merits); *see also Spock*, 464 F. Supp. at 519 (S.D.N.Y. 1978) (rejecting as premature pre-discovery motion to dismiss Federal Tort Claims Act suit against the NSA on state secrets grounds); *Foster v. United States*, 12 Cl. Ct. 492 (Cl. Ct. 1987) (upholding privilege but declining to dismiss). Even in the *Halkin* litigation, the court allowed the parties to fight "the bulk of their dispute on the battlefield of discovery," *Halkin II*, 690 F.2d at 984, and did not dismiss the case out of hand.

on the privilege where the purported state secrets are not relevant or necessary to the parties' claims or defenses, or where it appears that the parties can proceed with non-privileged evidence. *See, e.g.*, *Clift v. United States*, 597 F.2d 826, 830 (2d. Cir. 1979) (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed, however difficult it might be to do so"); *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968) (upholding claim of privilege in defamation suit, but remanding for further discovery of non-privileged evidence); *Crater Corp. v. Lucent Technologies*, 423 F.3d 1260, 1269 (Fed. Cir. 2005) (reversing dismissal on the basis of the privilege where the non-privileged record was not sufficiently developed and the relevancy of any privileged evidence was unclear); *Monarch Assur. P.L.C.*, 244 F.3d at 1364 (reversing dismissal on state secrets grounds so that plaintiff could engage in further discovery to support claim with nonprivileged evidence). Thus, courts have routinely rejected a "categorical rule mandating dismissal whenever the state secrets privilege is validly invoked." *DTM Research, L.L.C v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001).

Rather, dismissal of claims (or an entire suit) is proper only in two narrow circumstances that are not applicable here. First, dismissal may be proper if the "very subject matter" of the lawsuit is itself a state secret. *See DTM Research, L.L.C.*, 245 F.3d at 333-34 ("unless the very question upon which the case turns is itself a state secret, or ... sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, the plaintiff's case should be allowed to proceed....") (internal quotation marks omitted). Second, a case may be dismissed on state secrets grounds if a court determines, after consideration of non-privileged evidence, that plaintiff cannot present a prima facie case, or that defendant cannot present a valid defense, without resort to privileged evidence. *See Ellsberg v. Mitchell*, 709 F.2d 51, 64 n.55 (D.C. Cir. 1983) (remanding where district court had dismissed case on basis of privilege but "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Molerio v. FBI*, 749 F.2d 815, 822, 826 (D.C. Cir. 1984) (terminating suit only after evaluating plaintiffs' nonprivileged evidence and defendant's evidence). Even then, dismissal on the basis of the privilege is proper only if the Court determines that there is no alternative procedure that would protect secrets but still allow the claims to go forward in some way. Accordingly, courts must use "creativity and care" to devise "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3. Suits may be dismissed pursuant to the privilege "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Id*. at 1244.

C. The "Very Subject Matter" of this Action Is Not a State Secret.

Defendants' attempt to dismiss on the grounds that the very subject matter of the suit constitutes a state secret is misguided for two reasons—it misreads the applicable caselaw, and the facts necessary to decide this case are not secret at all.

1. The State Secrets Doctrine Permits Pre-Discovery Dismissal in Only Rare Circumstances Not Presented Here

The state secrets privilege is a common law evidentiary privilege that permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg*, 709 F.2d at 56; *see also In re United States*, 872 F.2d at 474. In only the rarest of circumstances may it be used not merely to block discovery of confidential material, but also to dismiss a claim altogether. Those circumstances are not present here.

United States v. Reynolds, 345 U.S. 1 (1953), the landmark state secrets case, established a framework designed to protect state secrets while at the same time ensuring that claims of privilege are not invoked lightly or for illegitimate reasons. *Reynolds* acknowledged (in dictum characterizing *Totten v. United States*, 92 U.S. 105 (1875)) that there may be rare instances where it is so clear that a case cannot proceed without disclosing state secrets that the case must be dismissed on the pleadings. 345 U.S. at 11 n.26 (citing *Totten*). But the Court did not order this remedy in *Reynolds* itself, it merely upheld the invocation of the privilege to block discovery of a specific document—an accident report—and then remanded the matter for further proceedings.[20] *Id.* at 11.

Courts since *Reynolds* have warned that the use of the state secrets privilege to dismiss claims *prior to discovery* is almost always improper. Recognizing that "denial of the forum provided under the Constitution for the resolution of disputes .... is a drastic remedy," *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985), the courts have characterized the ability to dismiss suits on the pleadings as "narrow," *id.* at 1243-44, and repeatedly cautioned against resort to such a "draconian" outcome. *In re United States*, 872 F.2d at 477. *See Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) ("An aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief.").[21]

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[20] Upon remand, Plaintiff's counsel deposed the surviving crew members, and the case was ultimately settled. 345 U.S. at 11. Recently disclosed facts regarding the *Reynolds* litigation show that strong judicial oversight in state secrets cases is an absolute necessity. The government had claimed that disclosure of a flight accident report would jeopardize secret military equipment and harm national security. The report was recently declassified, and the survivors of the men who perished on that flight learned the truth: the government had misled the Court. In fact, the accident report contained no details at all about the secret equipment. *See Herring v. United States*, 2004 WL 2040272, at *8 (E.D. Pa. Sept. 10, 2004) (noting that accident report "does not refer . . . to any newly developed electronic devices or secret electronic equipment"). The government apparently invoked the privilege not to protect secrets but rather to cover up its own negligence. *See id.* (the accident report revealed that "engine failure caused the crash" and that "had the plane complied with technical order . . . the accident might have been avoided").

[21] *See also United States v. Nixon*, 418 U.S. 683, 704-05 (1974) (rejecting claims that separation of power doctrine precludes judicial review of the executive's claim of privilege and reaffirming that "it is the province and duty of this Court to say what the law is").

In only two cases has the Supreme Court dismissed a matter on the pleadings. Both involved claims under alleged contracts to carry out espionage; in both, the Court held that the very nature of such contracts implied secrecy terms which "preclude[] any action for their enforcement." *Totten*, 92 U.S. 105, 107 (1875); *Tenet v. Doe*, 544 U.S. 1, 9 (2005) ("lawsuits premised on alleged espionage agreements are altogether forbidden"). The Supreme Court's decisions in *Reynolds* and *Totten* thus spawned two separate doctrines: first, "the state secrets privilege, which is an evidentiary and discovery rule" that "is not applicable at the pleading stage," and when validly claimed results only in nondisclosure of the particular evidence sought,[22] and second, a public policy doctrine based on *Totten* that calls for dismissal of those very few cases in which sensitive military secrets will be so central to the subject matter of the case that any effort to proceed with the litigation will threaten disclosure of privileged matters. *See Fitzgerald*, 776 F.2d at 1241-44 (characterizing the power to dismiss cases when "very subject matter" is a state secret as "narrow"). Defendants cannot invoke the broader *Totten* doctrine here, yet they essentially seek the broad immunity from review that *Totten*, not *Reynolds*, provided.[23]

2. The Subject Matter of this Suit is a Matter of Public Knowledge

The "very subject matter" of this suit is no state secret. Plaintiffs challenge a surveillance program the government has publicly acknowledged, described, and defended. The focus of this

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22 *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, No. CV-86-3292, 1989 U.S. Dist. LEXIS 19034, at *4 (E.D.N.Y. 1989).

23 An example is *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991), the only such Second Circuit case dismissed on the pleadings. That case arose out of an attack on a U.S. vessel in an areas of conflict (the 1987 U.S.S. Stark disaster in the Persian Gulf), and the plaintiffs' claims were directed at "design, manufacture, performance, [and] functional characteristics" of state-of-the-art military equipment, and military "rules of engagement." *Id.* at 547. Courts are traditionally hesitant to entertain claims questioning tactical practices of the armed forces on the battlefield, and a number of immunities might well have shielded defendants had the case not been dismissed on the pleadings. (For example, the private defendants argued that "courts should not entertain tort actions arising out of the engagement of United States armed forces in areas of hostility" and also that dismissal was warranted because the claims were being pursued against Iraq by the United States. *See Zuckerbraun*, 755 F. Supp 1134, 1136, 1136 n.2 (D. Conn. 1990).)

suit is not a secret at all—the question presented is a purely legal one about whether the President and the NSA broke the law and violated the Constitution by eavesdropping on Americans without a warrant.

The government's argument that the very subject matter of this case is a state secret is particularly absurd—it cannot "clos[e] the barn door after the horse has already bolted." *Doe v. Gonzales*, 449 F.3d 415, 423 (2d Cir. 2006) (Cardamone, J., concurring). *See, e.g.*, *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (the Court has not "permitted restrictions on the publication of information that would have been available to any member of the public"); *Snepp*, 444 U.S. at 513 n.8 (suggesting that government would have no interest in censoring information already "in the public domain"); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (holding that government had no compelling interest in keeping information sealed where the "information ha[d] already become a matter of public knowledge").[24]

Indeed, a Magistrate Judge in the Eastern District of New York recently rejected a blanket secrecy argument pressed by the government, and ordered the government to disclose whether any conversations between plaintiffs' counsel (including a named Plaintiff in this lawsuit) and their clients had been intercepted or monitored by the government, including by the NSA. *See Turkmen v. Ashcroft*, No. 02-CV-2307 2006 U.S. Dist. LEXIS 40675 (E.D.N.Y. May 30, 2006). In doing so, Judge Gold observed that "the government's electronic surveillance of individuals suspected of links to terrorism has received widespread publicity and has even been acknowledged by the President of the United States and other high-level government officials," that surveillance of the plaintiffs' attorneys via other means had also been publicly documented by the OIG, and concluded that "any claim that sensitive secrets would be revealed by the government's disclosure of whether conversations between plaintiffs and their counsel in [the] case were monitored is hard to fathom." *Id*. at *20-*21.

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[24] The government relies heavily on the recent decision in *El-Masri v. Tenet*, No. 1:05cv1417, 2006 WL 1391390 (E.D. Va. May 12, 2006), which Plaintiffs believe was wrongly decided and is currently on appeal. That case is inapposite. There, the district court accepted the CIA's argument that it could neither admit nor deny allegations at the center of the plaintiff's case. Here, by contrast, every single fact upon which plaintiffs rely in their motion for partial summary judgment has been publicly confirmed by executive officials.

Here, the government has not only acknowledged the existence and scope of the Program but has engaged in an aggressive public relations campaign to convince the American public that the NSA program is both lawful and necessary to protect national security. On January 19, 2006, the Department of Justice issued a 42-page White Paper discussing in detail its legal defenses and justifications for the NSA Program. *See* Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (available at http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf). Government officials have publicly testified before Congress about the legality, scope, and basis for the NSA surveillance program four times.[25] President Bush has discussed and promoted the NSA Program at least eight times through radio addresses, at news conferences, and at public events.[26] Vice President Cheney has promoted the NSA Program during a commencement address at the U.S. Naval

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[25] *The Worldwide Terror Threat: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2006), available at 2006 WL 246499 (testimony of John Negroponte, Director of National Intelligence and Gen. Michael Hayden, then Principal Deputy Director of National Intelligence); *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), available at 2006 WL 270364 (testimony of Alberto Gonzales, Att'y Gen. of the United States); *Operations of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006), available at 2006 WL 896707 (testimony of Alberto Gonzales, Att'y Gen. of the United States); *Hearing on the Nomination of General Michael V. Hayden to be the Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence*, 109th Cong. (2006).

[26] The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880, 1881 (Dec. 17, 2005); President's News Conference, 41 WEEKLY COMP. PRES. DOC. 1885 (Dec. 19, 2005); Remarks on the War on Terror and a Question-and-Answer Session in Louisville, Kentucky, 42 WEEKLY COMP. PRES. DOC. 40, 46-47 (Jan. 11, 2006); Remarks on the War on Terror and a Question-and-Answer Session in Manhattan, Kansas, 42 WEEKLY COMP. PRES. DOC. 101, 109 (Jan. 23, 2006); Remarks Following a Visit to the National Security Agency at Fort Meade, Maryland, 42 WEEKLY COMP. PRES. DOC. 121, 122-23 (Jan. 25, 2006); The President's News Conference, 42 WEEKLY COMP. PRES. DOC. 125, 128-29 (Jan. 26, 2006); Remarks on the Terrorist Surveillance Program, 42 WEEKLY COMP. PRES. DOC. 911 (May 11, 2006); The President's Radio Address, 42 WEEKLY COMP. PRES. DOC. 926 (May 13, 2006).

Academy and at four separate rallies for servicemen and servicewomen.[27] Administration officials have even participated in public web discussions in defense of the NSA Program.[28] The administration has ensured that its defense of the program receives the broadest possible public exposure. Having done those things, it cannot now insulate its actions from judicial oversight by arguing that the very subject matter of the case is a state secret.

Courts have properly rejected privilege claims over information that has already been widely publicized. In *Spock*, for example, the court rejected the claim that the NSA could not admit or deny that plaintiffs' communications had been intercepted without harm to national security, finding that this would "reveal[ ] no important state secret" particularly because it had already been disclosed in the *Washington Post*. 464 F. Supp. at 519. The court went on to hold that dismissal of plaintiffs' action was wholly inappropriate "where the only disclosure in issue [was] the admission or denial of the allegation that interception of communications occurred[,] an allegation which [had] already received widespread publicity. . . ." Rather, the court found that "the abrogation of the plaintiff's right of access to the courts could undermine our country's historic commitment to the rule of law." *Id.* at 520. Similarly, in *Jabara*, the district court observed that where information over which the government asserted the privilege had been revealed in report to Congress—specifically that it was the NSA that had intercepted plaintiffs' communications—"it would be a farce to conclude" that information "remain[ed] a military or state secret." 75 F.R.D. at 493; *see also In re United States*, 872 F.2d at 478 (rejecting privilege

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27 Vice President Richard Cheney, Commencement Address at the United States Naval Academy (May 26, 2006); Vice President Richard Cheney, Remarks at a Rally for the Troops at Fort Leavenworth (Jan. 6, 2006); Vice President Richard Cheney, Remarks at a Rally for the Troops at Charleston Air Force Base (Mar. 17, 2006); Vice President Richard Cheney, Remarks at a Rally for the Troops at Scott Air Force Base (March 21, 2006); Vice President Richard Cheney, Rally for the Troops at Fairchild Air Force Base (Apr. 17, 2006).

28 In January 2006, for example, Attorney General Gonzales conducted a web discussion—part of the White House's online interactive forum called "Ask the White House"—where he answered questions from members of the public regarding the NSA program. Alberto Gonzales, "Ask the White House" (Jan. 25, 2006), http://www.whitehouse.gov/ask/20060125.html.

claim, relying in part on prior release under FOIA of information relevant to litigation); *Ellsberg*, 709 F.2d at 61 (rejecting portion of privilege claim on ground that so much relevant information was already public).

The mere fact that this suit concerns a classified intelligence program does not transform the very subject matter of the suit into a state secret. No court has ever relied on the state secrets privilege to dismiss purely legal claims concerning the facial validity of a government surveillance program. Numerous cases that involve harms that flow from covert or clandestine programs or activity have been the subject of litigation, and often, even where the privilege is validly invoked over some evidence, the case has been allowed to proceed in some form.[29] Indeed, courts that have considered challenges to warrantless surveillance have not considered the "very subject matter" a state secret, even where the plaintiffs were challenging NSA surveillance. *See, e.g.*, *Jabara v. Webster*, 691 F.2d 272 (deciding claims on the merits even where some aspects of case were state secrets); *Jabara*, 75 F.R.D. 475 (ruling on the privilege claims but no suggestion that the very subject matter was a state secret); *Ellsberg*, 709 F.2d 51 (remanding some claims for consideration on the merits, despite upholding privilege claims over particular evidence); *Halkin v. Helms* (*Halkin I)*, 598 F.2d 1 (dismissing claims against the NSA only after discovery and not because the very subject matter was a state secret); *Spock*, 464 F. Supp. 510 (refusing to prematurely dismiss claims against the NSA on the basis of the privilege).

[29] *See, e.g., Kronisch v. United States*, 150 F.3d 112, 116 (2d Cir. 1998); *Kronisch v. Gottlieb*, 213 F.3d 626 (2d Cir. 2000) (Table), full text at 2000 U.S. App. LEXIS 8847 (case involving CIA clandestine LSD program); *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) (covert CIA mail opening program); *Heine*, 399 F.2d 785 (defamation case involving covert CIA spies); *Air-Sea Forwarders, Inc. v. Air Asia Co. Ltd.*, 880 F.2d 176 (9th Cir. 1989) (claims regarding CIA cover company); *Monarch Assur. P.L.C*, 244 F.3d at 1364 (claims involving covert CIA financing); *Avery v. United States*, 434 F. Supp. 937 (D. Conn. 1977) (CIA covert mail opening program); *Cruikshank v. United States*, 431 F. Supp. 1355 (D.C. Haw. 1977) (same); *Linder v. Calero-Portocarrero*, 180 F.R.D. 168, 176-77 (D.D.C. 1998) (claims for wrongful death of leaders of Nicaraguan Contra organizations); *Orlikow v. United States*, 682 F. Supp. 77, 79, 87 (D.D.C. 1988) (claims involving CIA's covert MKULTRA program); *Barlow v. United States*, 53 Fed. Cl. 667 (whistleblower claims involving facts about CIA and nuclear weapons proliferation).

3. FISA Overrides the State Secrets Privilege in This Setting

The government's position that anything concerning foreign intelligence gathering is a state secret, unfit for judicial review, is contradicted by FISA itself. The state secrets privilege is an evidentiary privilege rooted in common law, *In re United States*, 872 F.2d at 474; *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998), and can be abrogated by Congress. *Id.*[30] In the area of electronic surveillance, Congress has narrowed the common law state secrets privilege by a statute that "speaks directly to the question otherwise answered by federal common law."[31] Congress mandated in FISA that the wiretapping statutes be the "exclusive means by which electronic surveillance ... may be conducted." 18 U.S.C. § 2511(2)(f). At the same time Congress created a civil cause of action for violations of FISA, 50 U.S.C. § 1810, and a procedure governing review of the propriety of the process by which a FISA order was sought, 50 U.S.C. § 1806(f). The latter section makes clear that a judge may look past executive affidavits and scrutinize the underlying evidence "relating to the surveillance" in determining whether a disclosure of such information would harm the national security:

> [The court] shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.

50 U.S.C. § 1806(f); *see also* H.R. Conf. Rep. No. 95-1720, 1978 U.S.C.C.A.N. 4048, 4061 (Oct. 5, 1978) (provisions "adequate[ly] protect[] national security interests"); S. Rep. No. 95-

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30 In the *Kasza* decision, the Ninth Circuit considered whether the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6001, preempts the common law state secrets privilege. *Kasza*, 133 F.3d at 1167. Far from determining that Congress cannot limit the state secrets privilege, the Court engaged in a searching analysis of the statutory scheme of the RCRA to assess its implications for the state secrets privilege. (Ultimately, the Court held that the environmental statute did not speak to the common law state secrets privilege.)

31 *Kasza*, 133 F.3d at 1167 (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985) (quoting *City of Milwaukee v. Ill.*, 451 U.S. 304, 315 (1981))) (quotation marks and brackets omitted).

701, 1978 U.S.C.C.A.N. 3973, 4032-33 (Mar. 14, 1978) (calling § 1806(f) "a reasonable balance between an entirely in camera proceeding ... and mandatory disclosure").[32] The D.C. Circuit has suggested that this procedure under § 1806(f) may also be used in suits under FISA's civil damages action provision, 50 U.S.C. § 1810. *See ACLU v. Barr*, 952 F.2d 457, 470 (1991) (noting that Congress "anticipated that issues regarding the legality of FISA-authorized surveillance would arise in civil proceedings and ... empowered federal district courts to resolve those issues").

The creation by Congress of a specific cause of action for a FISA violation necessarily contemplates judicial review of actions taken by the government in violation of FISA. The Second Circuit recognized as much in an opinion holding that the state secrets privilege was waived with relation to litigation brought under an act allowing inventor to seek compensation for patents kept secret due to military necessity:

> The assertion by the United States of its privilege with respect to state secrets is, we think, governed by similar considerations. Congress has created rights which it has authorized federal district courts to try. Inevitably, by their very nature, the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of this privilege. Unless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the act [authorizing such claims] must be viewed as waiving the privilege.

Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958), cited approvingly in *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979) (Friendly, J.). By creating causes of action against the government—even going so far as to allow civil damages claims—in circumstances that would "by their very nature ... always involve matters within the scope of this privilege" as the government might colorably assert it, Congress acknowledged that the federal courts may

32 Provisions similar to 1806(f) were added by Congress to address pen registers and trap-and-trace devices, 50 U.S.C. § 1845(f), and physical searches, *id.* § 1825(g). These provisions demonstrate Congress' specific intent that the government not be permitted merely to declare surveillance to be a "state secret" and thereby eliminate the possibility of judicial review.

entertain actions under FISA, waiving or abrogating the common-law state secrets privilege with respect to such claims.[33]

4. For the Claims at Issue Here, No Remedy Is Available from the Political Branches in the Absence of Judicial Intervention

The present case is distinguishable from many of the other successful invocations of the state secrets privilege by the government, in a way suggested by Defendants' own arguments. In Part IV of their brief, Defendants argue that "even where allegations of unlawful or unconstitutional actions are at issue," "the state secrets doctrine finds the greater good—ultimately the less harsh remedy—to be dismissal." MTD at 48, for "[p]roceeding to litigate the subject matter of this dispute would cause grave harm of another kind—one that would potentially impact the security of all Americans." *Id*. at 49. Thus "private interests must give way to the national interest." *Id*. (quoting *El Masri v. Tenet*, 2006 WL 1391390 (E.D. Va. 2006) at *7).[34]

But this is not a case in which private interests are arrayed against the public good. Defendants ignore entirely the "greater good" of the separation of powers, and would in the name of secrecy grant the executive a trump card that would allow it to cover up its abuses, its incompetence, and its willful disregard for the will of Congress. Similarly empty is defendants' argument that the present dispute should be left to resolution by the political branches. MTD at 49. The vast majority of the claims dismissed under state secrets doctrine are those of private litigants seeking as their primary relief money damages for their injuries; such claims can be compensated by Congressional private bills, even in the face of a Presidential veto. *Cf. El Masri*, 2006 WL 1391390 at *8 (apparently suggesting such a remedy if plaintiff's allegations are true). Yet, short of impeachment, it is impossible to envision what a Congressional remedy for the claims at issue here would look like in the absence of judicial enforcement. Both clear statutory prohibitions like FISA and any future attempt to use the power of the purse to defund the NSA Program are equally meaningless without a judicial forum for their vindication.

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[33] Furthermore, numerous courts have adjudicated legal questions regarding foreign intelligence surveillance without confronting any state secrets problem. For example, courts have faced no evidentiary or state secrets obstacle in evaluating the constitutionality of FISA. *See, e.g.*, *United States v. Duggan*, 743 F.3d 59 (2d Cir. 1984); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987). Indeed, since 9/11, courts have evaluated the facial legality of government surveillance tools without any state secrets issues arising, and without any question regarding their authority to do so. *See, e.g.*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (evaluating constitutionality of the national security letter power in counter-terrorism and counter-intelligence investigations); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (same). To dismiss this case because the very subject matter is an alleged state secret would produce a perverse result: where Congress, by statute, authorizes the Executive to engage in foreign intelligence gathering, courts may review its legality and constitutionality, but where the executive branch secretly violates limits placed by Congress on executive eavesdropping, a court of law would be powerless to opine on its legality.

[34] *See also Duncan*, 1942 A.C. at 643; *but cf. In re. Grosvenor Hotel, London (No. 2)*, 3 W.L.R. (C.A. 1964) ("public interest" rationale "applied less satisfactorily when the claim is made on the class ground.").

III. NEITHER PLAINTIFFS NOR DEFENDANTS NEED STATE SECRETS TO PROVE OR DEFEND AGAINST PLAINTIFFS' CLAIMS.

A. Defendants Have No Valid Legal Defense That Requires Disclosure of State Secrets.

Defendants argue in the alternative that they need further facts to defend the legality of their actions, and those facts are all state secrets. As a result, Defendants maintain, they need not defend their actions at all, because the entire case should be dismissed. MTD at 24-47. Plaintiffs' claims, however, present purely legal issues fully presented on the basis of the facts already disclosed. Because Defendants can offer no valid legal defense to the claims that would require disclosure of state secrets, their motion to dismiss must be denied.

1. Defendants Cannot Defeat Plaintiffs' Standing by Invoking State Secrets.

Plaintiffs have established their standing to sue based on uncontested evidence that they are suffering concrete harm to their professional activities as a result of the NSA Program. *See supra* Part I. Whether or not Plaintiffs are actually subject to surveillance under the Program is irrelevant to their well-founded fear that they or the people they communicate with fit the publicly announced criteria for targets of the Program. The government concedes in its brief that the Program targets members of al-Qaeda, members of groups "affiliated with al-Qaeda," and agents of al-Qaeda and its affiliates. MTD at 1; *see also id*. at 23-24 (opining that no chill can result from this disclosure because some surveillance (whether lawful or under the Program) of such conversations must be assumed, a claim rebutted *supra*, Part I.B). Accordingly, the communications of Plaintiffs who represent or communicate with individuals the government suspects of being members of al-Qaeda or affiliates of al-Qaeda plainly fall within the scope of the program.

Defendants argue that they could defeat Plaintiffs' standing by providing the Court with details that would prove that Plaintiffs' communications do not fall within the scope of the NSA spying program, or that Plaintiffs' "have not been targeted for surveillance, or that by virtue of how the [Program] operates, have no reasonable fear of being targeted." MTD at 24. These defenses are invalid. Even if the government could present evidence that none of the Plaintiffs' communications had thus far been intercepted, that would not eliminate the harm already caused to Plaintiffs by the need to take reasonable measures to avoid being affected by the illegal surveillance publicly announced by the President and others in his administration.[35] It would also not establish that Plaintiffs' communications are not likely to be intercepted in the future. There are no additional facts that the government could produce—privileged or otherwise—that would defeat Plaintiffs' standing.

Defendants rely heavily on the D.C. Circuit's decisions in the *Halkin* litigation. The *Halkin* cases, however, were quite different from this case in a number of respects. First, the *Halkin* plaintiffs had to prove that they had been actually wiretapped to prevail on their

[35] Defendants claim that *Laird* forecloses any reliance on "knowledge that a government agency was engaged in certain activities" but that is clearly an incorrect reading of the law and misses the differences between the allegations of harm resulting from such knowledge in *Laird* and the present case. *See* Part I, *supra*.

(individual) damages claims.[36] With respect to injunctive relief, the *Halkin* plaintiffs argued that although the state secrets privilege made it impossible to prove that their communications had been seized, the fact that the CIA had caused the NSA to "watchlist" them gave them standing. The decision in *Halkin II* was based on the court's conclusion on the "critical fact," that plaintiffs could not "demonstrate any injury—past, present, or future—in connection with watchlisting." 690 F.2d at 998, n.78. Unlike *Halkin II*, Plaintiffs here have provided the court with evidence that the Program is causing concrete and ongoing harm to their ability to carry out their professional duties, in violation of their First Amendment rights.

Unlike the *Halkin* plaintiffs, whose principal argument was grounded on the Fourth Amendment, Plaintiffs here have already demonstrated their own concrete constitutional injuries under the First Amendment—harms that will continue regardless of whether Plaintiffs are actually being wiretapped. To the extent the *Halkin* plaintiffs made a First Amendment challenge to Executive Orders, the court concluded that plaintiffs had nothing more than a "generalized grievance" and had made no allegation of an injury in fact of any immediacy. The court likened the concerns of the *Halkin* plaintiffs to the plaintiffs in *Laird v. Tatum*, 408 U.S. 1 (1972), where the Supreme Court found that a mere "subjective chill" in exercising First Amendment rights was insufficient to confer standing.

The Plaintiffs in the instant case demonstrate an injury qualitatively different than what was alleged in *Halkin II* or *Laird*. In the latter case, the Court concluded that the plaintiffs' "chill"

> may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents'

[36] *Cf. Halkin I*, 598 F.2d at 6 (noting that "the acquisition of the plaintiffs' communications [was] a fact vital to their claims"); *Halkin II*, 690 F.2d at 990; *see also Ellsberg*, 709 F.2d at 53 (plaintiffs seeking damages).

> less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents.

408 U.S. at 13. In the instant case, however, the Plaintiffs' professional obligations as attorneys have required them to make specific changes in the way they are handling ongoing cases, in a way that concretely undermines their ability to exercise their own and their clients' First Amendment rights to litigate against the government. No such specific injury was alleged in either *Halkin* or *Laird.*

2. No State Secrets Could Support a Valid Defense to Plaintiffs' Statutory Claims

The government has admitted that it is engaging in warrantless surveillance covered by FISA. The question for the Court is whether, as a matter of law, the Executive has authority to do so, without following FISA's carefully circumscribed and exclusive procedures.. That is a question of law, not fact. The government has offered only one defense to Plaintiffs' statutory claim—namely that Congress, through the Authorization to Use Military Force (AUMF), authorized the President to engage in warrantless wiretapping of Americans on American soil. That is a purely legal question: does one statute, the AUMF, trump two other statutes, FISA and 18 U.S.C. § 2511(2)(f), which provide that FISA and Title III are the "exclusive means" for wiretapping Americans.

The government's AUMF defense turns on statutory construction, not facts—privileged or otherwise. The government devoted the bulk of its 42-page memorandum to Congress to arguing this precise point—presumably without disclosing any state secrets. Whether Congress intended the general AUMF to repeal the very specific FISA requirements is a purely legal question, and therefore does not require disclosure of privileged facts**.** Because no set of facts, hypothetical or real, could bring warrantless wiretapping of Americans on American soil within the scope of the AUMF—especially in light of yesterday's Supreme Court opinion in *Hamdan v. Rumsfeld*, 2006 WL 1764793 (June 29, 2006)—the state secrets privilege should not prevent resolution of this defense.

One of the many questions at issue in *Hamdan* was whether the AUMF provided Congressional sanction for the military commissions instituted at Guantanamo Bay Naval Station. The majority opinion in *Hamdan* stated that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the [Uniform Code of Military Justice]. *Cf. Yerger*, 8 Wall., at 105 ('Repeals by implication are not favored.')." Slip Op. at 29-30. In the absence of such "specific, overriding authorization," *id*. at 29, the Court found that Congress had not displaced the limits on the President's authority to constitute military commissions that it had previously established with the passage of the Uniform Code of Military Justice, a comprehensive scheme subjecting such commissions to the laws of war, including the Geneva Conventions.[37] In the instant case, a

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[37] The concurring opinions reinforce the notion that such a judicial interpretation best protects the integrity of our political system in times of crisis:

> This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.
>
> These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules.

Hamdan (Kennedy, J., concurring, joined by Souter, Ginsburg, Breyer, JJ.), Slip Op. at 1-2. Indeed, the same four justices concluded that holding the President accountable to law also strengthens our nation's ability to deal with danger:

> The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." ... They suggest that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. ... That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly

similarly comprehensive scheme regulates wiretapping for foreign intelligence surveillance, *see* Plaintiffs' Memorandum in Support of Summary Judgment, Dkt. 6 (hereinafter "MSJ"), at 2-5, 15-19, and there is similarly "nothing ... even hinting" at a Congressional intent to change that scheme in the text or legislative history of the AUMF.

3. No State Secrets Could Support a Valid Defense to Plaintiffs' Separation of Powers Claim

The government also seeks to avoid judicial review of Plaintiffs' claim that it has violated the separation of powers by intruding upon Congress's prerogatives. The government's effort to avoid judicial review of its broad defense of executive power by categorically invoking the state secrets privilege is as meritless as its effort to avoid review of Plaintiffs' statutory claims. Defendants posit that a more detailed explanation of "what the President has done and why" would support its view that the President had inherent constitutional authority to violate FISA, 18 U.S.C. § 2511(2)(f), and the separation of powers. MTD at 30. Specifically, the government contends that the court cannot resolve the legal and constitutional questions in the case without a plethora of facts about the specific nature of the al-Qaeda threat, the scope of the Program, and the operational details of the surveillance—all of which, it argues, are subject to the state secrets privilege. To the contrary, none of these facts could provide any valid defense to Plaintiffs' claims as a matter of law.

> at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." ... Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.
>
> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Id. (Breyer, J., concurring, joined by Souter, Ginsburg, JJ.), Slip Op. at 1.

The government suggests that state secrets about "the specific threat facing the Nation and the particular actions taken by the President to meet that threat" would support its claim of inherent authority and provide a valid defense to plaintiffs' claims. MTD at 3. However, the President has no authority to violate the law, no matter what his motivations may be, and no matter what kind of threat or emergency is posed. The Constitution simply does not grant the President any emergency powers to ignore the law. Details regarding the specific nature of the al-Qaeda threat, whether privileged or not, therefore provide no defense to the President's action.

The government argues that "even in *Youngstown,*" "the Supreme Court carefully considered the specific action at issue and its nexus to the President's authority to direct action against an enemy," MTD at 30. This is fundamentally incorrect. In fact, *Youngstown* contains no consideration of specific actions by the president. The president's action was considered at the most general level—whether the "Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." 343 U.S. at 587. There was no reference in the constitutional analysis to what was being produced in the factories seized, the product's importance to national defense, battlefield information (secret or otherwise) relevant to the need to produce munitions, the manner in which the factories seized were operated by the government, or any other factual details.

Similarly, the government misreads *Little v. Barreme.*[38] Contrary to the government's brief, the Supreme Court needed no information about the particular conflict between the United States and France, or about the specific danger posed by ships coming from France, to hold that Congress had "prescribed ... the manner in which [the law] shall be carried into execution." 6

[38] The government's argument actually cites to and is based on the language in the district court opinion which is set out in the Supreme Court opinion.

U.S. at 177-178. As a result of its analysis of the text of the statute, the Court concluded that the President had no authority to seize ships bound from France, as opposed to bound to France. Those cases, like the present case, presented a pure question of law regarding the separation of powers.

The government also suggests that facts regarding why the FISA process was insufficient to meet the threat of terrorism—despite the successful use of FISA to wiretap terrorists and spies for almost 30 years, including during times of war or emergency—would somehow provide a defense to Plaintiffs' claims. MTD at 38. However, under our constitutional system, if the President was dissatisfied with FISA's ability to meet the al-Qaeda threat, the appropriate course of action was to ask Congress to change the law, not to design and authorize a secret surveillance program that violates the law. As numerous justices expressed in Youngstown, where Congress lays out a procedure for the President to follow during a crisis, the President must follow that procedure. MSJ at 16, 28. Indeed, in the immediate aftermath of the 9/11 attacks, the Executive branch did successfully seek numerous specific changes to FISA. *See* MSJ at 14. No specific facts regarding the Executive's dissatisfaction with FISA can possibly provide a valid defense to Plaintiffs' claims.

The government next argues that privileged information about the technical details of NSA surveillance would support its defense. MTD at 35-37. Those details are irrelevant to the question of whether the President violated the law and the Constitution when he authorized such surveillance without a warrant. In *Keith*, the Supreme Court did not need to delve into the details of how the FBI was conducting domestic intelligence surveillance. The question was a purely legal one—whether the Constitution required a warrant. *See, e.g.*, *United States v. United States District Court*, 407 U.S. 297, 315-21 (1972) (hereinafter "*Keith*"). Finally, the government argues that privileged information about precisely who the Program targets would bolster its defense, suggesting that the Program is closely tied to "the conduct of a military campaign." MTD at 36. But those details are irrelevant because Congress specifically intended for FISA to regulate electronic surveillance of Americans on American soil—regardless of who they are—even in times of war or emergency. MSJ at 11-12. Indeed, the House Conference Report on FISA explains that Congress granted the President authority to engage in warrantless wiretapping after a declaration of war for 15 days to "allow time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency." H.R. CONF. REP. NO. 95-1720, at 16 (1978), reprinted in 1978 U.S.C.C.A.N. 4048, 4063. FISA provides for emergency installation of wiretaps in non-wartime emergencies as well—subject in all cases to subsequent judicial review. *See* MSJ at 20. No details about the precise targets of the surveillance can alter the fact that the President lacked authority under FISA to engage in surveillance without a warrant.

Ultimately, under either theory of executive power advanced by the parties, the Court needs no more facts to resolve whether the President has "inherent" authority to ignore the law. Either the President has the authority to break the law or he does not. Under the Plaintiffs' theory, the President has no authority to violate FISA or the Constitution, and details about the al-Qaeda threat and the operation of the Program are irrelevant. Under the government's theory, the President has the unilateral authority to violate the law to meet any situation he deems an emergency or threat. Under either theory, no more facts are needed and thus no state secrets are implicated.

4. No State Secrets Could Support an Exception to the Fourth Amendment's Warrant Requirement.

Plaintiffs' Fourth Amendment claim can also be resolved exclusively on the basis of the non-privileged and public evidence already before the court. The government's brief ignores basic Fourth Amendment doctrine to reach its conclusion that recourse to state secrets is necessary. The Supreme Court has consistently held that searches and seizures are per se unreasonable when conducted without a warrant and without probable cause, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 352 (1967) and cases cited therein. This overriding principle has been repeatedly reaffirmed by the Court. *See, e.g.*, *Skinner v. Railway Labor Executives' Assoc.,* 489 U.S. 602, 619 (1989).

Because wiretapping constitutes a search within the meaning of the Fourth Amendment, *Katz*, 389 U.S. at 352, warrantless wiretapping is presumptively unconstitutional. None of the "specifically established and well-delineated exceptions" applies here. Although the government envisions an exception to the warrant requirement for foreign intelligence surveillance, this is not an exception that has ever been recognized by the Supreme Court. The government argues that such an exception exists based solely on three Court of Appeals decisions that were decided before FISA was enacted, and on dictum in an ex parte decision of the Foreign Intelligence Surveillance Court of Review. For the reasons cited in our original brief, MSJ at 34-35 and 35 n.76, and because the existence of such an exception would contravene the rationale of *Keith*, MSJ at 34, Plaintiffs submit that there is no persuasive authority for concluding that such an exception exists. The fears of these lower courts concerning intolerable delay, security leaks, and judicial incompetence have simply not been borne out by the nation's experience under the FISA regime, which has demonstrated that the warrant requirement does not "unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it." *Keith*, 407 U.S. at 315. The passing reference to this issue in dictum in *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Rev. 2002), does not even rehearse an argument supporting the existence of such an exception.

In *Ellsberg*, the D.C. Circuit rejected the government's argument that state secrets necessarily prevented the government from arguing that there was a foreign intelligence exception to the warrant requirement. The court stated that there was "no reason to relieve those who authorize and conduct [warrantless foreign intelligence taps] of the burden of showing that they come within the exemption." 709 F.2d at 68. As the court explained,

> In many such situations, the government would be able (as it has been here) to refuse to disclose any details of the circumstances surrounding the surveillance by invoking its state secrets privilege. The result would be to deny the plaintiffs access to all of the information they need to dispute the government's characterization of the nature and purpose of the surveillance. And the net effect would be to immunize, not only all wiretaps legitimately falling within the hypothesized 'foreign agent' exemption, but all other surveillance conducted with equipment or under circumstances sufficiently sensitive to permit assertion of the state secrets privilege. We find such consequences unacceptable.

Id. at 68 (emphasis added). In fact, the court went on to note that such a consequence "might call into question the very existence of the foreign agent exception." *Id*. Accordingly, because the defendants had not yet made any showing regarding the existence and application of any foreign intelligence exception to the warrant requirement, the court refused to dismiss those claims and remanded to the district court. *Id*. The court noted that the remaining questions were primarily "questions of law" that could be resolved in camera if necessary. *Id*. at 69; *see also Jabara*, 691 F.2d at 276 (referring to the district court's conclusion that because "defendants had divulged the interception and later transmittal to the FBI ... the state secret[s] privilege was no impediment to the adjudication of [plaintiffs'] fourth amendment claim"); *Jabara*, 75 F.R.D. at 489 (after upholding Attorney General's claim of privilege, pointing out that the "matter ha[d] not ended" because the court still had to determine "whether the warrantless electronic surveillances ... comp[lied] with the commands of the Fourth Amendment"); *id*. at 493 (same, with regard to privilege claim by Secretary of Defense).

The government ignores the rule that searches without warrants and probable cause are per se unreasonable—remarkably, this well-settled doctrine is not even mentioned in its brief. Instead the government argues as though Fourth Amendment jurisprudence consists solely of a murky balancing test in which "the need for a warrant turns on the facts and circumstances at issue," and whether probable cause is required for searches involves only "inherently factual considerations." MTD at 39. Although such language can be found in the cases the government cites, these are all cases that fall within the well-delineated exceptions and this language simply describes the operation of these exceptions.

The government's argument that national security warrantless wiretapping is justified by the "special needs" exception is unpersuasive and may be rejected without recourse to state secrets. Surveillance of suspected terrorists is not sufficiently independent of law enforcement to fit within this exception. The government reads the exception far too broadly. It claims the exception whenever "the government faces an increased need to be able to react swiftly and flexibly, *or* where interests in public safety beyond the interests in ordinary enforcement are at stake." MTD at 41, emphasis added. The case cited for this proposition by the government, *Skinner*, MTD at 39, does not support such a wide scope for this exception. *Skinner*, in fact, specifically relied upon the argument that there would be little for a magistrate to decide with respect to drug testing for railway employees because of the standardized nature of the tests and the limited discretion of those administering the program, the limited nature of the intrusions and the reduced expectation of privacy of railroad employees. *Skinner*, 489 U.S. at 622, 624, 627. As we argued in our original brief, MSJ at 37-38, the invasion of privacy of the conversations here exceeds what has been permitted under the special needs exception and these plaintiffs have an enhanced, rather than diminished, expectation of privacy in their professional conversations.

Determining whether there is an exception to the warrant requirement for foreign intelligence surveillance inside the United States does not require this Court to delve into the details of the Program any more than determining whether there was a domestic intelligence exception required the Supreme Court, in *Keith*, to delve into the specifics of the Executive's domestic intelligence efforts. In that case, as here, the critical fact was that the Executive was engaged in intrusive surveillance without judicial oversight. In *Keith*, as here, that critical fact gave rise to the question—the purely legal question—whether such surveillance is permitted by the Fourth Amendment.

5. Defendants Have No Valid Defense to Plaintiffs' First Amendment Claim That Would Require State Secrets.

The NSA spying program violates the First Amendment for two reasons. First, it permits the NSA to obtain constitutionally protected speech without any judicial oversight, and thus does not comply with procedural safeguards necessary to safeguard First Amendment rights. MSJ at 39-42. Because the government has already conceded that the Program involves no judicial oversight, there is no set of facts, privileged or otherwise, that could provide a valid legal defense. Similarly, no state secrets could transform warrantless wiretapping into a less restrictive alternative than FISA, which has worked for decades to address the government's interest. MSJ at 2-5. Second, the Program imposes financial burdens on the exercise of plaintiffs' rights as public interest attorneys to petition the government for redress of grievances, as discussed above.

Plaintiffs are entitled to summary judgment on their First Amendment claim for reasons similar to those discussed above. Because the Program impinges on the First Amendment rights of plaintiffs and others, the government can justify the Program only if it can demonstrate that it is the least restrictive means of achieving a compelling state interest. *See, e.g., Gibson v. Fla. Legislative Investigative Comm.*, 372 U.S. 539, 546 (1963); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). There is no doubt, of course, that the Executive has a compelling interest in gathering intelligence about foreign threats to the country. Indeed, Congress implicitly accepted this proposition by enacting FISA. But the same statute that supports the Executive's contention that it has a compelling interest in gathering foreign intelligence makes clear that the Program is not narrowly tailored to that interest.

B. Even If the Court Believes That Defendants Require More Facts to Assert a Valid Defense, Dismissal at This Stage Would Be Improper.

If the Court ultimately determines that more facts are necessary for Plaintiffs' case or the government's defenses, it should still reject Defendants' motion to dismiss the case at this juncture. Dismissal on the basis of the state secrets privilege is appropriate only where the Court is satisfied that it is impossible for the parties to prove their claims and valid defenses with non-privileged evidence and that no alternative to dismissal could protect any legitimate secrets in the case. *Ellsberg*, 709 F.2d at 64 n.55, 65; *see supra* Part II. The Court cannot adequately make this determination on the basis of the government's unilateral and categorical assertion that it cannot defend itself without state secrets.[39] Indeed, courts are obligated to carefully scrutinize and probe

[39] If the Court determines that Plaintiffs need more facts to prove their prima facie case, which even the government does not seriously contend, dismissal would not be appropriate. The Court could easily structure a limited and controlled discovery process to resolve discrete factual questions. Defendants, of course, would retain the ability to assert the privilege over particular pieces of information. *See, e.g.*, *Jabara*, 75 F.R.D. at 478, 483, 485,

deeply any claim of state secrets privilege, particularly where the government is urging dismissal. *See Reynolds*, 345 U.S. at 11 (the plaintiff's need for allegedly privileged information "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."); *ACLU v. Brown*, 619 F.2d at 1173 (en banc) ("the privilege should not be lightly accepted where there is a strong showing of need by the requesting party"); *Jabara*, 75 F.R.D. at 479 (stating that the Court had "given the most careful consideration to each claim of privilege to insure that it is exercised with utmost fairness and caution").

Rather than dismissing the suit at this stage, the Court should first rigorously evaluate the breadth and propriety of the government's privilege claim over whole categories of information. The Court should require the government to be as specific as possible about the particular evidence that is privileged, the necessity of that evidence to a valid defense, and the reason its disclosure would harm the nation. Broad generalities about national security should not suffice.[40] At this stage, the Court should be skeptical of the government's claim that blanket and categorical secrecy is necessary. *Turkmen*, 2006 U.S. Dist. LEXIS 40675, at *21; see *also Doe v. Gonzales*, 449 F.3d at 422 (Cardamone, J., concurring) ("[u]nending secrecy of actions taken by government officials may ... serve as a cover for possible official misconduct"). It is hard to imagine, even if Defendants did need more evidence to support their defenses, that every aspect of the threat posed by al-Qaeda and every technical detail about NSA spying would be both relevant to a valid defense and a state secret.

Because the government is seeking dismissal—a dire consequence—the Court should also require the government to produce the actual evidence that it alleges is privileged. *See, e.g.*,

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490 (providing some discovery, including the admission that plaintiffs had been surveilled, despite invocation of the privilege over other evidence).

[40] *Cf. In re United States*, 872 F.2d at 478 (noting that "an item-by-item determination of privilege will amply accommodate the Government's concerns"); *see also National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding that privilege must be asserted on an document-by-document basis).

Ellsberg, 709 F.2d at 59 n.37 ("[w]hen a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful in camera examination of the material is not only appropriate, but obligatory.") (internal citations omitted); *Jabara*, 75 F.R.D. at 486, 491 (examining materials underlying both the Secretary of Defense and Attorney General's privilege claims in camera); *ACLU v. Brown*, 619 F.2d at 1173 ("a party's showing of need often compels the district court to conduct an in camera review of documents allegedly covered by the privilege in order to determine whether the records are properly classified," and remarking that "[a]ny other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy"). This way, the Court can evaluate whether the claim of privilege is proper, whether the information is properly classified, and whether disclosure of information will legitimately cause harm to national security, with reference to the actual evidence.[41] Examining the evidence underlying the privilege claim is particularly vital in this case because if Plaintiffs are foreclosed from seeking a remedy in this Court, the illegal spying program is likely to remain in operation indefinitely. *See* MSJ at 6 n.14.

Indeed, in other cases challenging unlawful surveillance, the government has disclosed evidence to support plaintiffs' claims. In *Jabara*, for example, "the government divulged in the open record that NSA did intercept and later turn over to the FBI [plaintiffs'] communications." *Jabara*, 691 F.2d at 275 n.5; *see also id.* at 276 (describing district court's conclusion that because "defendants had divulged the interception and later transmittal to the FBI ... the state secret[s] privilege was no impediment to the adjudication of [plaintiffs'] fourth amendment claim"); *Ellsberg*, 709 F.2d at 53-55 (refusing to dismiss claims where the government had admitted to warrantless wiretapping and remanding for consideration of the merits in some form).

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[41] Again, courts are empowered and competent, and indeed in this circumstance obligated, to ensure that information is properly classified. *See supra* note 17 (citing cases). In evaluating allegedly classified information, the Court should remain mindful that the Executive's tendency to excessively and unnecessarily classify documents is well-known and well-documented. *See generally* Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989 at A25; *see also* Meredith Fuchs, *Judging Secrets: The Role the Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133-34 (2006).

To the extent that any non-privileged information can be disentangled from privileged information, it should be shared with Plaintiffs. The Court should make every effort to ensure that "sensitive information ... [is] disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57; *see also In re United States*, 872 F.2d at 479 (court of appeals was "unconvinced that district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfold[ed]"). There is nothing radical about sharing with plaintiffs any and all non-privileged evidence, even where other evidence may be legitimately privileged.[42] The Court has many mechanisms available for safeguarding non-privileged but ultimately sensitive evidence from unauthorized disclosure if need be.[43]

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[42] Courts have, where applicable, routinely allowed nonsensitive discovery to proceed even after upholding a claim of privilege over certain evidence. *Reynolds*, 345 U.S. at 11 (upholding privilege claim but remanding for deposition because it would "be possible . . . to adduce the essential facts as to causation without resort to material touching upon military secrets"); *Monarch Assur. P.L.C.*, 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); Crater Corp., 255 F.3d at 1365 (government provided some discovery despite invocation of the privilege); *In re Under Seal*, 945 F.2d at 1287 (same); *Patterson v. FBI*, 893 F.2d 595, 598 (3d Cir. 1990) (same); *Ellsberg*, 709 F.2d at 54 (same); *The Irish People, Inc.*, 684 F.2d at 931 (same); *Halkin I*, 598 F. 2d at 6 (same).

[43] In civil cases, courts often utilize seals, protective orders, or discovery in secure locations in order to protect any sensitive information in civil proceedings. *In re Under Seal*, 945 F.2d at 1287; *Heine*, 399 F.2d at 787; *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. at 436, 437 n.5; *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004); *United States v. Lockheed Martin Corp.*, No. CivA1:98CV00731EGS, 1998 WL 306755 (D.D.C. May 29, 1998). In addition, courts routinely protect classified information used in criminal proceedings through protective orders. *See*, *e.g.*, 18 U.S.C. app. III § 3; *United States v. Pappas*, 94 F.3d 795, 797 (2d Cir. 1996); *United States v. Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993); *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995). Courts have also appointed special masters, *Loral Corp. v. McDonnell Douglas Corp*, 558 F.2d 1130, 1131 (2d Cir. 1977), and even held in camera trials, *Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958).

Indeed, even where evidence introduced in civil proceedings is classified, the government has granted clearance to attorneys and permitted them to see the evidence on numerous occasions.[44]

The inquiry should not end even if the Court ultimately determines that defendants cannot prove a valid defense without privileged evidence. The Fourth Circuit has admonished courts to use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3. Thus, courts faced with privilege claims have stated that, if necessary, the Court can "delve more deeply than it might ordinarily into marshalling the evidence on both sides" in order to protect potentially sensitive information. *Irish People*, 684 F.2d at 955; *Ellsberg*, 709 F.2d at 69 (directing in camera review of evidence); *Heine*, 399 F.2d at 791 (same). The Court itself, after examination of the evidence, may make "representative findings of fact from the files" and provide summaries of the information, in a manner that would not compromise the privilege. *Irish People*, 684 F.2d at 954. The Court could even pose questions about the merits to the government.[45]

Other courts have suggested that an appropriate alternative to dismissal merely on the basis of the privilege—but as a last resort—is in camera examination of the evidence that purportedly supports the government's defense, and a determination on the merits. In *Molerio*, for example, the court evaluated the privileged and non-privileged evidence and resolved the claims on the merits. *See* 749 F.2d at 825; *see also Halpern*, 258 F.2d at 41. In *Ellsberg*, after holding that the government could not use the state secrets privilege to avoid its burden to prove that the warrantless surveillance at issue fit into the warrant exception, the court suggested that such questions of law could, if necessary, easily "be resolved by the trial judge through the use of appropriate in camera procedures." 709 F.2d at 69. Courts have been particularly "willing to order in camera inspection where there has been a suggestion of illegality by the government." 26 WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5671 (2d ed. 1992) at 734 (citing *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc)). The *Ellsberg* court emphasized that "this procedure should be used only as a last resort," because "[e]x parte, in camera resolution of dispositive issues should be avoided whenever possible." 709 F.2d at 69 n.78; *but see* WRIGHT & GRAHAM § 5671 at 734 ("many of [the countervailing arguments against in camera proceedings] would be resolved or weakened if courts did not automatically assume that every in camera hearing had to be ex parte as well.").[46]

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[44] *See, e.g.*, *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 179-80 (noting in protective order that "counsel for petitioners in these cases are presumed to have a 'need to know' information both in their own cases and in related cases pending before this Court."); *Al Odah v. U.S.*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (noting counsel in three Guantanamo habeas cases would be "required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources"); *Lockheed Martin Corp.*, 1998 WL 306755, at *5 (issuing protective order stating that "defendant's identification of an individual as someone required for the defense of this litigation will establish a 'need to know' for access to the specific classified information"); *see also Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003) (noting that plaintiffs' counsel had received security clearance from CIA to aid in representing alleged covert CIA agents), *rev'd on other grounds*, 544 U.S. 1 (2005); *In re United States*, Misc. No. 370, 1993 WL 262656, at *2-3 (Fed. Cir. Apr. 19, 1993) (acknowledging that government had granted clearance to numerous counsel in civil litigation).

[45] *See also United States v. Ehrlichman*, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974) ("courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures"); *see also In re United States*, 872 F.2d at 480 (upon rejecting a premature privilege claim noting its "confidence that [the district court could] police the litigation so as not to compromise national security.").

While some of these alternatives are extreme, any alternative would be preferable to the dismissal of this case and the elimination of any possibility of resolution on the merits of Plaintiffs' targeted wiretapping claims. "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald*, 776 F.2d at 1244. If the Court believes that Defendants may need

[46] Indeed, it was disdain for ex parte in camera proceedings—redolent of the Star Chamber to English courts—that led the Law Lords in *Duncan* to hold that courts could not look past the executive affidavit to the underlying evidence. *See Duncan v. Cammell, Laird and Co., Ltd.*, 1942 A.C. 624, 635 (House of Lords 1942); *see also* Amicus Br. of Fisher & Weaver at 10 (quoting *Beatson v. Skene* to effect that review of documents is "an inquiry which cannot take place in private"). (The *Reynolds* court, notably, borrows most of its formulation of the privilege directly from *Duncan*, but omits from its discussion the language from *Duncan* that comes closest to making the executive affidavits dispositive of the question of privilege. Compare *Duncan*, 1942 A.C. at 642, with *Reynolds*, 345 U.S. at 7-8 & 8 n.21.)

privileged information for a valid defense—and Plaintiffs emphatically believe that Defendants do not—any of these alternatives to dismissal are available to the Court.

V. THE STATUTORY PRIVILEGES ASSERTED IN DEFENDANTS' BRIEF PROVIDE NO BASIS FOR DISMISSAL OF THIS ACTION

The government's reliance upon supposed statutory privileges, MTD at 49-50, is misplaced. Defendants have found no precedent to support using the NSA non-disclosure statute (section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402 note), or the DNI non-disclosure statute (section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. § 403-1(i)(1)) or its predecessor (50 U.S.C. § 403(d)(3)), as affirmative bases for dismissing a lawsuit. Rather, both statutory privileges are typically invoked to justify withholding documents requested under the Freedom of Information Act (FOIA). None of the cases cited by Defendant support using the DNI statute or its predecessor to create any evidentiary privilege whatsoever. In *Snepp v. U.S.*, 444 U.S. 507, 510 n.3 (1980), the Court read the statute as support for agency authority to create a standard CIA employment agreement requiring prepublication review; the other two cases cited by defendants, *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990), and *CIA v. Sims*, 471 U.S. 159 (1985), use the statute as a basis for withholding under FOIA.

The NSA statute is similarly inapt. It was created to "eliminate an operational conflict" (H.R. Rep. No. 86-231, at 2), namely the agency's desire to avoid providing personnel data to the Civil Service Commission. Indeed, Section 6 was described in the House Report as being "in the nature of a savings clause" (H.R. Rep. No. 86-231, at 4). This description squares with a plain reading of the clause, which suggests that it was merely intended to clarify that the NSA's *specific* exemption from statutory disclosure requirements should be read to trump other *general* disclosure statutes (FOIA being one modern example).[47] The only case that cites the statute to support any kind of evidentiary privilege, *Linder v. NSA*, 94 F.3d 693 (D.C. Cir. 1996), does so to quash a subpoena directed at a discrete set of evidence. Of course, Plaintiffs here are not currently seeking any discovery to prove their claims. There is no basis for reading the statute as a Congressional mandate to remove all information about the "organization or any function" of the NSA from appropriate judicial review.

Moreover, if these statutes were read as broadly as the defendants suggest they would very likely be unconstitutional. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (Court held that §102(c) of the National Security Act of 1947 could not bar claim of former CIA employee for employment discrimination, noting the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.").

CONCLUSION

This case squarely raises the question of whether the state secrets privilege requires the dismissal of an action to enjoin executive action that is illegal and unconstitutional. Defendants think the answer clear: even blatant constitutional violations are immune from judicial inquiry once an executive official announces that, in his opinion, disclosures necessary to the litigation of the case would somehow harm national security. By claiming that the judiciary may not further scrutinize the claims of immunity made here, Defendants would effectively allow the President to dictate to the federal courts which cases they may and may not hear.

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[47] Indeed, the actual language of the clause states: "*Except as provided in subsection (b) of this section*, nothing in this act or any other law" shall be construed to require disclosure of various information about the NSA's structure and activities. 50 U.S.C. § 402 note, subsec. (6) (emphasis added). Defendants follow the *Linder* Court in selectively failing to quote the italicized portion. MTD at 49; *Linder*, 94 F.3d at 696. Subsection (b) makes certain NSA employees subject to the Civil Service Commission reporting act, and the italicized qualification clearly indicates, on the face of the statutory text (*contra Linder*, *id*.), that the exemption created by Section 6 is far less than absolute.

Such a rule is fundamentally incompatible with the structure of American democracy. Our divided system of government can only function when the Courts are willing to hold the executive to account for breaking the law. As the Supreme Court announced yesterday:

> Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

Hamdan v . Rumsfeld, 2006 WL 1764793 (June 29, 2006) (Kennedy, J., concurring), Slip Op. at 1-2. The permanent damage that would be caused by the abject abandonment of our constitutional system of checks and balances and separation of powers is incalculably greater than any temporal danger that might be presumed to exist to our national security from external enemies. Indeed, in the long run our safety is best ensured by an open, accountable process whereby the President seeks approval of his means of fighting terrorism from Congress:

> judicial insistence upon [Executive consultation with Congress] does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means.

Hamdan, 2006 WL 1764793 (June 29, 2006) (Breyer, J., concurring), Slip Op. at 1.

At stake here is not merely whether an individual may have to forego a judicial determination of liability and damages for a wrong done by the government in order to preserve national security. In this case the executive makes the extraordinary claim that the need for secrecy disables the judiciary from exercising its "province and duty to say what the law is" and enjoining the President from engaging in clearly unconstitutional and illegal actions—all of which he has admitted taking. This case does not juxtapose, as Defendants claim, the interests of a small group of private claimants against the greater national good. Instead, it arrays the interests of all Americans in preserving the Constitutional structure of our government against those who would grant the President broad emergency powers and give him the absolute discretion to judge when they may be invoked.

Two extraordinary cases demonstrate the need for judicial scrutiny of executive overreaching despite asserted national security concerns. In *Korematsu v. United States*, 323 U.S. 214 (1944), the wholesale transportation and internment in camps of the Japanese-American population on the West Coast was upheld by the Supreme Court because it concluded it could not "reject as unfounded" the conclusion of the military authorities that there was the "gravest imminent danger to the public safety." 323 U.S. at 218. Forty years later, both Congressional and judicial authorities documented that the Department of Justice had been in possession of information contradicting General DeWitt's report, on which the Supreme Court relied, and that the government's brief in the Supreme Court had been redrafted twice to keep that fact from the Court. *Korematsu v. United States*, 584 F. Supp. 1406, 1417-18 (N.D. Cal. 1984). The Commission established by Congress to study the matter concluded that the detention of the Japanese Americans was in fact caused not by military necessity, but by "race prejudice, war hysteria and a failure of political leadership." *Id*. *Korematsu* occupies some of the most shameful pages in the United States Reports.

At the other end of the spectrum of judicial review lies the Pentagon Papers case, *New York Times Co. v. United States,* 403 U.S. 713 (1976). The government claimed that national security required an order forbidding *The New York Times* and the *Washington Post* from publishing a classified study concerning the Vietnam War already in their possession. The Supreme Court rejected the argument and the papers were published, with no adverse consequences to national security.[48] Cases such as these should leave this Court skeptical of the broad claims of secrecy the executive makes under the banner of national security and in the shadow of 9/11.

Our concern about the impact of secrecy claims on constitutional democracy is far from rhetorical. Since September 11 the current Administration has grown the size of secret government in an unprecedented manner and in a variety of ways. The number of classification actions annually protecting government information from disclosure nearly doubled from 2001 to 2004, reaching an all time high of 15.6 million.[49] Information previously available to the public has been reclassified to render it secret.[50] A number of new laws have created new categories of secret information and placed gags on speech about law enforcement matters.[51] The detention of "enemy combatants" at home and in Guantánamo was conducted in near-absolute secrecy until courts began to assert their power to review the facts purportedly justifying the designations. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). The detention and deportation of thousands of non-citizens in the weeks following September 11 was conducted under a veil of secrecy, with the result that major human rights and civil rights violations occurred.[52] Despite broad claims that all these detainees were associated with terrorism, the vast majority of these accusations turned out to have no support whatsoever. The only certain effect of all these secrecy measures has been to obstruct the voting public's ability to evaluate the competence of the executive in securing the nation against terrorism. A secondary effect has been to inhibit our ability, as public interest lawyers, to successfully litigate challenges to this administration's unlawful tactics in the "war on terror." And that brings us back to the present case.

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[48] The Solicitor General Erwin Griswold, who argued for secrecy, later admitted that he had opposed publication although he had in fact perceived no threat to national security. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, A25, n. 127.

[49] INFORMATION SECURITY OVERSIGHT OFFICE (ISOO), REPORT TO THE PRESIDENT 2004, at 3 (2005), available at http://www.archives.gov/isoo/reports/2004-annual-report.pdf. *See* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133 (2006).

[50] *See* Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, N.Y. Times, Feb. 21, 2006 (seven year secret program at the National Archives by intelligence agencies to remove from public access thousands of historical documents that were available for years, including some already published by the State Department and others photocopied years ago by private historians.)

[51] *See, e.g.*, the critical infrastructure information provisions of the Homeland Security Act of 2002, 6 U.S.C. § 133 (Supp. II 2002); the gag order provisions of the USA PATRIOT Act, 50 U.S.C. § 1861(d) (Supp. II 2002); and revisions to the sensitive security information provisions of the Air Transportation Security Act, 49 U.S.C. §§ 114 (s), 40, 119 (Supp. II 2002).

This action challenges the President's program of warrantless electronic surveillance on its face.[53] It presents a pure legal and constitutional issue about the power that the President has. The President's contrived argument that he has implied powers that depend on facts that cannot be disclosed is simply an excuse to avoid meeting the substance of our claims. Plaintiffs submit that, particularly in light of the action that Congress has taken in this area by enacting FISA, there is no set of facts that would permit the President under the Constitution to authorize a program of warrantless electronic surveillance over a four-year period.

For the foregoing reasons, this Court should reject the government's assertion of the state secrets privilege, proceed to rule on the merits of Plaintiffs' summary judgment motion[54] and enjoin the Defendants from committing further violations of law.

Respectfully submitted,

s/Shayana Kadidal
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[52] *See* Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), *available at* http://www.usdoj.gov/oig/special/0306/index.htm.

[53] See, *Halkin v. Helms*, 690 F.2d 977, 1000 n.81 (D.C. Cir. 1982), noting that facial constitutional challenges are "capable of resolution without any significant development of a factual record."

[54] Objections to Defendants' request for a stay of Plaintiffs' Motion for Summary Judgment have been noted in a previous brief, Dkt. 47.

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June 30, 2006

[*] Counsel acknowledge the invaluable contributions throughout this litigation of their colleagues at the American Civil Liberties Union, the Electronic Frontier Foundation, and their respective co-counsel.

Certificate of Service

I, Shayana Kadidal, certify that on June 30, 2006, I caused the foregoing Memorandum (together with the supporting Affirmations of Stephen Gillers, Maria LaHood, Rachel Meeropol, and the Supplemental Affirmation of William Goodman) and Motion for Enlargement of Page Limits to be filed electronically on the ECF system and served via email on the counsel for defendants listed below.

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